THE SUPERIOR COURT OF NEW JERSEY

HONORABLE WILLIAM L. FORESTER, J.S.C
Judge, Superior Court of New Jersey

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Francis Osei-Afriyie
212 Lone Tree Drive
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Re: State v. Osei-Afriyie

Gentlemen:

Issue Presented

Whether this court should affirm the Municipal Court holding that the defendant refused to submit to a breath test in violation of N.J.S.A. § 39:4-50.2.

Statement of Facts / Procedural History

Francis Osei-Afriyie ("D") IS A 60 year-old male. On May 28, 2007, he received five motor vehicle tickets: following too close, careless driving, driving while

intoxicated, opened container, and refusal to submit to a breathalyzer test. D was required to submit to two breath samples by breathing 1.5 liters into the Alcotest for a duration of 4.5 seconds. He only provided samples of .09 liters for 2.9 seconds and 1.0 liters for 3.0 seconds. On, September 11, 2007, D appeared with his attorney, Thomas Shusted, before the Honorable David Krell and pled guilty to refusing to submit to a breathalyzer test. The other charges were dismissed. However, the sentence was stayed to determine if an adequate breath sample was given on the pending New Jersey Court holding in State v. Chun. D reappeared with counsel before Judge Krell on July 16, 2008 in an attempt to vacate his guilty plea based on the Chun holding. Judge Krell denied vacating D's guilty plea because (1) D did satisfy Chun and (2) the medical reports entered into evidence did not indicate that D was incapable of providing the correct sample due to a medical condition. The sentence that was set forth at the September 11, 2007 hearing was imposed. On August 4, 2008 notice of the Municipal Court appeal was filed with CCMO. In the appeal, some new arguments are raised.

Defendant's Argument

D asserts seven arguments why the Municipal Court should be overruled. (1) The medical reports that he submitted into evidence demonstrated that he was unable to give the required volume of breath due to his medical condition. (2) The State failed to disprove that the medical evidence demonstrated the reasons for his inability to provide the sample. (3) D's Sixth Amendment right to confrontation was violated because the test operator was unavailable to testify. Also, the 3 foundational documents required of Chun, were not admitted into evidence. (4) D submitted breath samples and the operator abused his discretion by terminating the test after only two attempts.

(5) The Judge acted improper by assuming the role of a medical expert.

State's Argument

First, D failed to demonstrate that his guilty plea should have been vacated. A court may vacate a plea or a defendant may be permitted to withdraw a plea if the court determines that the interest of justice would not be served by effectuating the agreement. R. 3:9-3(e). For plea bargaining to be an effective tool, it must be conducted fairly and the result must not disappoint the reasonable expectations of either party. State v. Thomas. A defendant shall not be entitled to withdraw a guilty plea based on a whimsy or a change of mind. State v. Taylor. Here, D entered into a guilty plea and a sentence was imposed. A stay was granted only in the event that the Chun decision would affect the disposition. On July 16, 2008, Judge Krell determined that the medical evidence submitted by D did not indicate that D was incapable of exhaling the required amount of air. Also, Judge Krell found that the Chun decision did not affect the present case because D failed to demonstrate that he is within the the suspect group that the Supreme Court set forth new standards. Second, D failed to establish that he did not refuse to take the breathalyzer test. Even though a defendant agrees to give a sample, further actions by the defendant, such as thwarting its proper operation, can equate to a refusal. State v. Geller. A defendant is required to give at least two samples and failure to do so would constitute a refusal. State v. White. In the present case, D agreed to submit breath samples. D submitted two samples and when each sample was not of the required volume and duration, D, was charged with refusal.

Legal Analysis

R 7:6-2b states that a "motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice." Furthermore, R. 3:9-3e provides:

> If at the time of sentencing the court determines that the interests of justice would not be swerved by effectuating the agreement reached by the prosecutor and defense counsel or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea.

Where the defendant's application is made before sentencing, the defendant has the burden of persuasion to establish plausible reasons as to why his motion should be granted. See State v. Simon, 161 N.J. 416, 444 (1999). Defendant must provide ca factual basis to support his motion to a withdrawal of plea. State v. Lighter, 99 N.J. 313 (1985). Where a plea agreement is entered pursuant to a pleabargain, a defendant carries a heavier burden to succeed in withdrawing that plea. State v. Means 191 N.J. 610, 620 (2007) (citing State v. Smullen), 118 N.J. 408, 416 (1990).

In New Jersey, the courts can "exercise their discretion liberally" and "vacate the plea" if the application to withdraw the guilty plea is made before sentencing and the defendant is asserting his innocence. Statev. Deutsch, 34 N.J. 190, 198 (1961). "[T]he measure of what constitutes fair and just reason for withdrawal must be reposed in the sound confidence of the court." Means, 191 N.J. at 620 (citing Smullen), 118 N.J. at 417.

Our courts recognize the "important interest of finality to pleas." Ibid.; State v. Huntley, 129 N.J. Super. 13, 18 (App.Div. 1974); See also State v. Thomas, 61 N.J. 314, 322(1972) (reasoned that it is "important to ensure that after the agreement has received final judicial sanction, it will be carried out according to its terms"). In denying defendant's motion, the Appellate Division stressed the importance of the "approved philosophy of plea bargaining" which is "dependant on the good faith of both sides carrying out the bargain when it is voluntarily and knowingly made, is fair and just and is ultimately approved by a trial judge." Ibid. The court elaborated that a "whimsical change of mind by defendant will not be a valid reason for altering bargain" and "even a belated assertion of innocence will not upset an otherwise validly entered into plea agreement." Ibid.

The New Jersey Supreme Court stated that "representations made by a defendant at plea hearings concerning the voluntariness of the decision to pled, as well as any findings made by the trial court when accepting the plea, constitute a "formindable barrier"which defendant must overcome before he will be allowed to withdraw his plea." Simon, 161 N.J. at 444 (quoting Blackledge v. Allison 431 U.S. 63, 74 (1977). The Court explained that "[t]hese selumn declarations in open court carry a strong presumption of truth." Ibid. Thus, "a guilty plea voluntarily entered into should not generally be vacated in the absence of some plausible showing of a valid defense against the charges." Ibid. In Simon, even though the defendant recanted his guilt prior to sentencing, he was not permitted to withdraw his plea because, after reviewing the record, the Court found that he had voluntarily and knowingly pled. Ibid.

In the present case, it appears that the interest of justice would be served by effectuating the agreement reached by the prosecutor and D. On September 11, 2007 D voluntarily and knowingly entered a plea of guilty. His sentence was stayed pending the outcome of State v. Chun. He was unable to show that he falls within the group that Chun determined should have a lower criteria for the amount of breath required for a valid sample. Also, nothing in the medical reports that he submitted into evidence indicated that he was incapable of providing the required breath sample due to a medical condition. **The guilty plea was an agreement between D and the State and it was accepted by Judge Krell**. Pursuant to State v. Means, it is good faith for both sides to carry out the bargain.

A. The plea agreement should not be vacated because D is not within the group that Chun determined should have a lower criteria for providing breath samples

In State v. Chun, the Supreme Court of New Jersey stated the four minimum criteria for a breath sample are: () minimum volume of .5 liters; (2) minimum blowing time of 4.5 seconds;(3) minimum flow rate of 2.5 liters per minute and (4) that the IR measurement reading achieves a plateau (i.e. the breath alcohol does not differ by more than one percent in 0.25 seconds." 194 N.J. 54 (2008); 2008 N.J. LEXIS 133, 1, 72-73. **The Court found that the Alcotest is scientifically reliable and that its results are admissible in prosecutions for driving while intoxicated.** The Court determined that "[t]he minimum breath volume requirement should be lowered, for women over sixty years of age only, from 1.5 liters to 1.2 liters " because that group may not have the physiological capability of providing a larger sample. Id. at 5-6. The Court concluded that this modification does not violate equal protection rights. Id.at 5.

The Court in Chun also explained the procedure for administering the Alcotest.

The Alcotest permits up to eleven attempts to collect two breath samples, after which, the only options the device offers are "terminate" or "refusal." If the operator chooses terminate, the Alcotest will reset and the subject can then be given the opportunity for eleven more attempts. If the operator chooses "refusal" the test ends, but the operator is not required to issue s summons for refusal... Charging an arrestee with refusal remains largely within the officer's discretion. Id. at 77.

In the present case, D did not satisfy the breath sample requirements of providing a minimum volume of 1.5 liters and blowing for a minimum of 4.5 seconds. D gave two samples, both of which were below the minimum criteria. D does not fall within the group that the Supreme Court of New Jersey in Chun determined should have a reduced criteria. Even if he was within that group, women over sixty years of age, D still failed to provide the lesser amounts. In addition, D asserted in his July 16, 2008 appearance that the officer administering the Alcotest should have instructed D to provide additional samples since the Alcotest allows for up to eleven attempts to collect two samples. However, there is no requirement that the officer allow all eleven attempts. Only two samples are needed. It is the officer's discretion if two failed failed attempts are sufficient to constitute a refusal.

1) B. The plea agreement should not be vacated because D

was unable to present that his inability to provide the correct breath sample was based on a medical condition .

In Chun the Court had the opportunity to lower the criteria for those individuals incapable of providing the required amount of breath because of medical conditions. The Court chose not to include people with medical conditions. Including D in the group of women over sixty years of age based on his medical condition would probably be an unwarranted expansion of Chun. Furthermore, nothing in the medical reports indicates that D was incapable of providing the minimum breath sample, specifically a minimum volume of 1.5 liters and a minimum blowing time of 4.5 seconds. Although the police report stated that he was "unable" to give a sufficient breath sample, Trooper Christian Cresong testified that he was "unable" to give the proper sample because of uncooperativeness, not inability.

In State v. Chun, the Supreme Court of New Jersey stated, "We have no doubt the device [Alcotest], with the safeguards we have required, is sufficiently scientifically reliable that its reports may be admitted in evidence. Id.at 166. Those safeguards that must be implemented in prosecutions based on the Alcotest include (1) twelve foundational documents must be provided in discovery, (2) the test operator must be available to testify and /or to provide her Alcotest qualifications, and (3) three core foundational documents must be produced into evidence. "[A]ll of the documents relating to working order of the simulator, the reports of the solutions used during simulation and calibration, the certificate of accuracy of the simulator used to calibrate the device, and the temperature probe documents" should be provided in evidence. Id. at 158-159. The operator of the Alcotest is required to be made available for cross-examination or the operator must "produce evidence of his qualification through a certificate or a current operator card." Id. at

152. The three core foundational documents that establish the good working order of the device that must be admitted into evidence include:

(1) the most recent calibration report prior to defendant's test, with part I—control tests, part II—linerity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the analysis of the 0.10 simulator solution used in a defendant's control tests. Id. at 159.

In the present case , it is unclear whether the twelve foundational documents were requested or produced in discovery.**It is assumed that they were not since they are not referenced in the record**. The test operator did not testify, nor did he provide his Alcotest qualifications. Instead, the arresting officer who witnessed the operation of the Alcotest testified. D did not get the opportunity to cross-examine the operator. Furthermore, the three core foundational documents were not entered into evidence. However, D has only raised these issues on appeal. They were not discussed in the Municipal Court. Therefore, remanding the case for further fact finding would be improper.

Based on the on the foregoing, the findings and the decision of the Municipal Court are affirmed. Mr. DeSimone to submit the appropriate order.

Very truly yours,

WILLIAM L. FORESTER, J.S.C.
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